

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of) WT DOCKET NO. 94-147
)
JAMES A. KAY, JR.)
)
Licensee of one hundred fifty two Part 90)
Licenses in the Los Angeles, California, Area)

To: Administrative Law Judge
Richard L. Sippel

WIRELESS TELECOMMUNICATIONS BUREAU'S
MOTION TO ENLARGE ISSUES

1. The Acting Chief, Wireless Telecommunications Bureau, by his attorneys and pursuant to Section 1.229 of the Commission's Rules, hereby requests the Presiding Judge to enlarge the scope of this hearing proceeding to include the misrepresentation issue specified below against James A. Kay, Jr. ("Kay"). In support whereof, the following is shown.

2. This motion is being filed within 15 days of discovery of the facts upon which this motion is based. See 47 C.F.R. § 1.229(b)(3). While the alleged misrepresentation occurred at the outset of this proceeding, Bureau counsel only recently ascertained the information which forms the basis for the instant motion during an effort to re-familiarize themselves with the facts of this case following a long procedural hiatus. Furthermore, given that the issues being requested herein inquire into Kay's propensity to deal truthfully during an FCC adjudicatory proceeding and therefore are decisionally significant, good cause exists for

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considering this motion to enlarge.

3. On January 25, 1995, Kay filed a Motion to Enlarge, Change or Delete Issues in the instant proceeding. Therein, at page 4, Kay represented to the Presiding Judge that "Kay has no interest in any of the licenses or stations held by Marc Sobel." In an affidavit attached to the pleading, Kay declared, under penalty of perjury, that the information contained in his Motion to Enlarge, Change or Delete Issues was true and correct. However, just four weeks earlier, on December 30, 1994, Kay had entered into a Radio System Management and Marketing Agreement ("Management Agreement") with Marc Sobel whereby Kay acquired significant interests in several of Marc Sobel's licenses and stations. Copies of Kay's Motion to Enlarge, Change or Delete Issues and the Management Agreement are attached hereto.

4. The terms of the December 30, 1994, Management Agreement -- which vested in Kay substantial present and future interests in Sobel's stations and licenses -- cannot be reconciled with Kay's January 25, 1995, representations -- in which Kay categorically denied under penalty of perjury that he has an interest in any of Sobel's stations or licenses. Indeed, without more, the only conclusion that can reasonably be drawn is that Kay deliberately dissembled in his motion and accompanying affidavit to the Presiding Judge in this proceeding.

5. It is well settled that the ability of the Commission to rely on the representations of applicants and licensees is crucial to the functioning of our regulatory process. Richardson Broadcast Group, 7 FCC Rcd 1583 (1992) (subsequent history omitted). Indeed, the

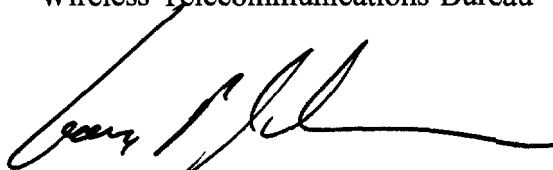
Commission's demand for absolute candor is itself all but absolute. Emission de Radio
Balmaseda, Inc., 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 4335
(1993). The sine qua non for a finding of disqualifying misrepresentation or lack of candor is
an intent to deceive the Commission. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129
(1983). Moreover, Section 1.17 of the Commission's Rules requires truthful written
statements in all filings with the Commission.

6. Based on the foregoing, a substantial and material question of fact exists as to
whether Kay misrepresented material facts to the Commission or lacked candor during the
hearing proceeding in WT Docket No. 94-147. Such a question necessarily calls into doubt
Kay's basic character qualifications to be and remain a licensee. Although a party's candor is
always in issue in an adjudicatory hearing, addition of the issues requested below would
clearly place Kay on notice that the truthfulness of his statements to the Commission are in
question, that Kay's representations will be the subject of a full and complete inquiry, and
that adverse conclusions of law may be drawn from the facts adduced at hearing concerning
Kay's candor during this proceeding.

7. According, the Bureau requests the Presiding Judge to add the following issues,
with all burdens to be placed on the Bureau:

- (a) To determine whether James A. Kay, Jr., misrepresented material facts or lacked candor during the hearing proceeding in WT Docket No. 94-147.
- (b) To determine, based on the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr., is basically qualified to be and remain a Commission licensee.

Respectfully submitted,
Dan Phythyon
Acting Chief
Wireless Telecommunications Bureau

A handwritten signature in black ink, appearing to read "Kellett", followed by a long horizontal flourish.

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April 9, 1997

ATTACHMENT

Kay's Motion to Enlarge, Change or Delete Issues

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

JAMES A. KAY, JR.)

Licensee of one hundred sixty)
four Part 90 licenses in the)
Los Angeles, California area)

PR DOCKET NO. 94-147
WT DOCKET NO. 94-147

To: Hon. Richard L. Sippel, Administrative Law Judge

MOTION TO ENLARGE, CHANGE OR DELETE ISSUES

10 + 3

JAMES A. KAY, JR.

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Dated: January 25, 1995

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SUMMARY OF THE FILING

James A. Kay, Jr. (Kay), by his attorneys, respectfully requests that the presiding officer enlarge, change or delete certain issues of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture (HDO) in the above captioned matter.

Kay filed certain applications which were unlawfully dismissed by the Private Radio Bureau. Certain other applications filed by Kay are currently pending before the Commission. Kay requests that the presiding officer add an issue designating those applications for hearing in the instant proceeding.

Kay requests that certain call signs designated for hearing be deleted from the instant proceeding. Kay is not the licensee of those stations and has not interest in them, whatsoever.

Kay requests that certain issues be changed or deleted which allege that he violated provisions of law which either are not susceptible to being violated by an individual or for which the applicable Commission Rule provides its own self-effectuating remedy.

With respect to only one of the designated issues is the HDO sufficient to give Kay notice of the facts and law which are alleged against him. As to all other issues, Kay requests that the presiding officer either change the designated issues to give him notice of the facts and law alleged against him or delete the issues. In the alternative, Kay requests that the presiding officer order the Bureau to present a bill of particulars as to the facts which are alleged against him and specifying the provisions of law which he is alleged to have violated.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
JAMES A. KAY, JR.)	PR DOCKET NO. 94-147
)	WT DOCKET NO. 94-147
Licensee of one hundred sixty)	
four Part 90 licenses in the)	
Los Angeles, California area)	
To: Hon. Richard L. Sippel, Administrative Law Judge		

MOTION TO ENLARGE, CHANGE OR DELETE ISSUES

James A. Kay, Jr. (Kay), by his attorneys, pursuant to Section 1.229 of the Commission's Rules, hereby respectfully requests that the presiding officer in the above captioned matter enlarge, change, or delete certain issues designated in the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (HDO). In support of his position, Kay shows the following.

On January 31, 1994, W. Riley Hollingsworth, Deputy Chief, Private Radio Bureau, Licensing Division (Hollingsworth), sent to Kay a letter pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. §308(b). The letter requested that Kay supply certain information. Subsequently, Hollingsworth sent to Kay a series of letters requesting that same information in support of certain then-pending applications for new or modified station licenses.¹ Kay responded to each of Hollingsworth's letters with respect to

¹ Those applications had been assigned file numbers 415060, 415082, 415236, 415237, 415243, 415255, 415274, 415294, 415303, 415304, 415315, 415316, 415317, 415319, 415321, 415322, 415333, 415347, 415367, 415369, 415374, 415382, 415392, 415407, 628816, 632210,

specific applications. Kay repeatedly demanded the right guaranteed to him by Section 309(e) of the Act, 47 U.S.C. §309(e), to a hearing on each of his applications.² *See, e.g.,* Exhibit I hereto.³ However, to date, the Commission has failed to afford Kay his right to a hearing on his applications. Instead, in violation of the right guaranteed to Kay by Section 309(e) of the Act, Hollingsworth dismissed most of Kay's applications.⁴

Because Section 309(e) affords Kay a right to a hearing on his applications which were unlawfully dismissed by Hollingsworth, and because enlarging the issues in the instant hearing proceeding to include those applications will most expeditiously conduce to the ends of justice

640638, 666464, and 666672.

² Section 309(e) provides, in relevant part, that

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally, 47 U.S.C. §309(e). Review of Sections 309(a) of the Act and Section 308, which is referenced at Section 309(a), clearly demonstrates that all of Kay's applications were subject to the procedural protection provided by Section 309(e) of the Act.

³ Among the applications referenced at Exhibit I hereto is an application filed by Marc Sobel d/b/a Airwave Communications, rather than by Kay. Hollingsworth erroneously attributed Sobel's application, file number 415367, to Kay.

⁴ Although Hollingsworth threatened to dismiss certain of Kay's applications by a letter dated October 28, 1994, to date the Commission has neither dismissed those applications nor granted Kay a hearing on them. Those applications had been assigned file numbers 415367, 415369, 415374, 415382, 415392, 415407, 666484, and 666672. Kay has filed a timely appeal of each dismissal action taken by Hollingsworth.

and administrative efficiency, Kay respectfully requests that the presiding officer enlarge the issues designated in the HDO to include each of the applications which are referenced at footnote 1, *supra*.⁵ If Kay is found in the instant proceeding not to possess the qualifications required to be a Commission licensee, then having the applications which are in dispute designated as a part of the instant proceeding would allow the Commission to dispose of the applications without further action. If Kay is found in the instant proceeding to have the requisite qualifications, then having the applications as a part of the instant proceeding will allow the immediate grant of those applications, without the necessity of engaging in any further action. Accordingly, the ends of justice and the Commission's interest in administrative efficiency can be served by enlarging the issues in the instant proceeding to include all of Kay's applications which were dismissed by Hollingsworth and which are still currently pending before the Commission.

On September 16, 1994, Hollingsworth set aside the Commission's grant to Kay of the license for Specialized Mobile Radio Service station WNMY402 at Mt. Lukens, California. In a timely manner, Kay requested reconsideration of that action. Consequently, that application is currently pending before the Commission.

On November 18, 1994, Hollingsworth set aside the Commission's grant to Kay of renewal of three licenses. However, as released, the HDO did not designate Kay's renewal

⁵ Kay is not a party to the application of Marc Sobel, file number 415367, and, therefore, it is of no importance to Kay whether the Commission designates that application for hearing. However, Kay is concerned that the Commission treat Sobel's application fairly by not entangling Sobel's application in its controversy with Kay.

applications for hearing. Together with the applications which Hollingsworth threatened to dismiss, but which the Commission has not dismissed, the renewal applications are pending before the Commission. Accordingly, so that the Commission can reach a complete determination on the licensing of Kay in this proceeding, and so that the Commission avoids the necessity of later actions concerning the pending applications in the event that the Kay is found to be qualified to be a Commission licensee, the HDO should be revised to add an issue as to all of Kay's pending applications. In that way, the presiding officer can conveniently act in one statement to grant all of Kay's pending applications.

Attached to the HDO was an Appendix A, listing 164 call signs of Private Land Mobile Radio Services stations. For the following reasons, Kay respectfully requests that the presiding officer change or dismiss the HDO to delete all references to the licenses numbered 154 through 164.

James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. As shown by the affidavit of Marc Sobel attached as Exhibit II hereto, Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named as a party to the instant proceeding, the presiding officer should either change the HDO to delete

the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the HDO with respect to those stations.

Section 554(b)(3) of the Administrative Procedure Act, 5 U.S.C. §554(b)(3), provides that a person entitled to notice of an agency hearing shall be timely informed of "the matters of fact and law asserted." Because the HDO failed to provide Kay with lawful notice of the matters of fact and law asserted with respect to many of the issues designated for hearing, certain issues designated in the HDO should be deleted or changed.

At paragraph 10(a) of the HDO, the Commission designated an issue as to whether Kay had "violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to the Commission's inquiries". Section 308(b) of the Act is a grant of authority by Congress to the Commission. Section 308(b) does not impose any requirement or any prohibition on any person. Accordingly, Section 308(b) is not a statute which is capable of violation by an individual.

Similarly, Section 1.17 of the Commission's Rules is a statement of the Commission's authority. Section 1.17 of the Commission's Rules additionally provides that "no applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." However, the HDO did not allege any specific fact of any specific instance

in which Kay either made any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission which was sufficient to allow a reasonable person to prepare an adequate defense. In the absence of any specific factual allegation as to any instance in which Kay either made a misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission, Kay was not given adequate notice of the issue designated against him. Therefore, the issue designated at paragraph 10(a) of the HDO should be deleted or the HDO should be changed to give Kay notice of the specific facts which constitute the allegation against him.

At paragraph 2 of the HDO, the Commission stated that it had "received a number of complaints regarding the construction and operation of a number of Kay's licensed facilities." At paragraph 10(c) of the HDO, the Commission designated an issue "to determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules." However, the HDO failed to give Kay notice of any fact of any specific instance in which he is alleged to have violated any of the rules referred to at paragraph 10(c).

Section 90.155 of the Commission's Rules requires that a station be constructed and placed in operation within a specified period of time. However, Rule Section 90.155 provides its own remedy for any failure by a licensee to complete construction and place a station in operation in a timely manner, namely, automatic cancellation of the license. By its own terms, Section 90.155 is a "no-fault" rule, incapable of violation by any person to the extent that failure

to act within the specified time has any consequence beyond automatic cancellation of the license. If Kay had failed to place a station in operation within the time allowed, he would have no valid license and there would be nothing for the Commission to revoke at the conclusion of the instant proceeding. Even if Rule Section 90.155 were capable of violation by a licensee, the HDO failed to provide Kay with notice of any fact concerning any instance in which he allegedly failed to construct a station or place it in operation in a timely manner. Since Rule 90.155 cannot be violated by a licensee in any manner that has any consequence beyond automatic cancellation of the license and because the HDO failed to give Kay notice of any instance in which he allegedly violated that Rule, the presiding officer should either delete reference to alleged violation of that Rule or should change the HDO to give Kay notice of the facts alleged against him which are sufficient to allow him to prepare a defense.

Rule Section 90.157 defines permanent discontinuance of station operation. Like Rule Section 90.155, Rule 90.157 is self-executing as to the remedy for permanent discontinuance of station operation, namely, automatic cancellation of the station license. By its own terms, Rule Section 90.157 is not susceptible to violation by any person to the extent that failure to continue station operation has any consequence beyond automatic cancellation of the license. If Kay had failed to continue operation of any station for the time set forth in the Rule, the license would have cancelled automatically and there would be nothing for the Commission to revoke at the conclusion of the instant proceeding. Since Rule 90.157 cannot be violated by a licensee in any manner that has any consequence beyond automatic cancellation of the license and because the HDO failed to give Kay notice of any instance in which he allegedly violated that Rule, the

presiding officer should either delete reference to alleged violation of that Rule or should change the HDO to give Kay notice of the facts alleged against him which are sufficient to allow him to prepare a defense.

Rule Section 90.313(a) establishes the maximum loading on certain channels. The HDO set forth no fact concerning any allegation that Kay had exceeded the maximum permissible loading on the channels covered by Rule 90.313. Rule Section 90.313(b) requires certain reporting by licensees. The HDO failed to make any allegation of fact that Kay had, in any specific instance, violated Rule Section 90.313(b). Because the HDO is bereft of any fact constituting an allegation that Kay had, in any specific instance, violated Rule 90.313, the presiding officer should delete reference to alleged violation of that Rule or should change the HDO to give Kay notice of the facts alleged against him which are sufficient to allow him to prepare a defense.

Section 90.623 of the Commission's Rules sets forth a multitude of requirements which a licensee might conceivably violate, and some which are not capable of being violated by any person.⁶ However, the HDO gave Kay no notice of a fact constituting an allegation that Kay had violated any specific portion of the Rule. Because the HDO is devoid of any fact constituting an allegation that Kay had, in any specific instance, violated any portion of Rule 90.623, the presiding officer should delete reference to alleged violation of that Rule or should

⁶ Subsequent to the release of the HDO, amendments to Rule Section 90.623 became effective, removing some of the limitations and requirements.

change the HDO to give Kay notice of the facts alleged against him and of the specific subsection or subsections of the Rule which he is alleged to have violated which are sufficient to allow him to prepare a defense.

Rule Section 90.631 contained, at the time of the release of the HDO, a collection of provisions, some of which might be violated by a licensee, and some of which cannot be violated by any person. Rule 90.631(a) establishes a standard, but imposes no requirement on anyone. Accordingly, Kay could not have violated Rule 90.631(a). Rule 90.631(b) had a variety of requirements, including a requirement that an applicant make a certification to the Commission. The HDO contained no fact constituting an allegation that Kay had failed to make any required certification. Section 90.631(b) also provided automatic cancellation of a license in the event of the licensee's failure to meet the stated requirement, which, by its own terms, constitutes a complete remedy for the licensee's failure. Rule Section 90.631(c) required a licensee seeking to expand a trunked system to have met a certain requirement. However, the HDO failed to present any fact constituting an allegation that Kay had, in any specific instance, violated Rule 90.631(c). Kay does not do business in any rural area, and, therefore, it is clear to Kay that he is not alleged to have violated Rule 90.631(d), which applies only to rural systems. Rule Sections 90.631(e)&(f), like Rule 90.155, establish a period of time within which a station must be constructed and placed in operation, and like Rule 90.155, provide the sole and automatic remedy for a licensee's failure to meet the requirement.⁷ Kay has never been authorized for

⁷ Rule Section 90.631(f), as published at 47 C.F.R. §90.631(f), also provided a standard for determining whether a licensee had permanently discontinued operation of a station. However, the Commission suspended enforcement of that rule almost immediately it had adopted

or even applied for a wide area system or a ribbon system, and, accordingly, has no reason to believe that he could possibly have violated Rule Sections 90.631(g)&(h). Kay is not the licensee of any SMRS station in the band covered by Rule Section 90.631(i), and, therefore, has no reason to believe that he could possibly have violated Rule Section 90.631(i). Because the HDO provided no fact constituting an allegation that he had violated any specific subsection of Rule 90.631 in any specific instance, the HDO failed to give Kay notice of the facts alleged against him or the specific rule of law which he was alleged to have violated which was sufficient to allow him to prepare an adequate defense. Accordingly, Kay respectfully requests that the presiding officer either delete the reference to Rule 90.631 from paragraph 10(c) of the HDO or change the HDO to give him adequate notice of the facts and law which are to be placed in issue.

Section 90.633 of the Commission's Rules contained, at the time of the release of the HDO, a variety of provisions, some of which are susceptible to being violated by a licensee, and some of which are not. The HDO failed to inform Kay of which subsection or subsections of Rule 90.633 he was alleged to have violated. Rule Sections 90.633(a)&(b) establish standards and conditions on licenses, but are not capable of being violated by any person. Rule Section 90.633(c), like Rule 90.155, establishes the period of time within which a station must be constructed and placed in operation. Like Rule Section 90.155, it provides its own, self-activating remedy for a licensee's failure to meet the deadline, namely, automatic cancellation

it and has never lifted the suspension.

of the station license. Because Rule 90.633(c) provides an automatic consequence for a licensee's failure to act within the specified time, such a failure has no consequence beyond automatic cancellation of the license. If Kay had failed to place a station covered by Rule 90.633(c) in operation within the time allowed, he would have no valid license and there would be nothing for the Commission to revoke at the conclusion of the instant proceeding. Even if Rule Section 90.633(c) were capable of violation by a licensee, the HDO failed to provide Kay with notice of any fact concerning any instance in which he allegedly failed to construct a station or place it in operation in a timely manner. Rule Section 90.633(e) establishes the standard which a licensee must meet to qualify to apply for additional frequency pairs. The HDO provided not a single fact constituting an allegation that Kay had ever violated Rule 90.633(e). Kay is not a licensee of and has never applied for a wide area or ribbon configuration system, and, therefore, Kay could not possibly have violated those sections of the Commission's Rules. Since Rule 90.633(c) cannot be violated by a licensee in any manner that has any consequence beyond automatic cancellation of the license and because the HDO failed to give Kay notice of any instance in which he allegedly violated any specific portion of Rule 90.633, the presiding officer should either delete reference to alleged violation of that Rule or should change the HDO to give Kay notice of the facts alleged against him and the specific rule of law which he is alleged to have violated which are sufficient to allow him to prepare a defense.

At paragraph three of the HDO, the Commission stated that "information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names." Nothing in the Communications Act or the Commission's Rules prohibits

a person from using a number of names in conducting his business before the Commission. Neither paragraph three nor paragraph 10(d) of the HDO made any allegation that in any specific instance Kay had used various names for purposes of violating any of the Commission Rules or any other specific rule of law. Paragraph three of the HDO listed a collection of names under which the Commission suggested that Kay may have done business, but nowhere in the HDO is there notice of any specific fact of any specific instance in which Kay is alleged to have used a specific name for the purpose of avoiding compliance with the Commission's Rules. In response to the Commission's January 31, 1994, inquiry, Kay informed the Commission of all names under which he did business. Paragraph three of the HDO includes all of the names under which Kay does business, demonstrating that the Commission knows all of the names.⁸ However, nowhere in the HDO is there any allegation that Kay used any specific name for the purpose of avoiding compliance with the Commission's Rules in any specific instance.

Since the allegation presented at paragraph three and the issue designated at paragraph 10(d) of the HDO were insufficient to give Kay notice of any specific instance in which he allegedly violated the Commission's Rules in any way, Kay respectfully requests that the presiding officer either delete as immaterial the allegation presented at paragraph three and delete the issue designated at paragraph 10(d) of the HDO. In the alternative, Kay respectfully requests that the presiding officer change the HDO in such a manner as would allow a reasonable person

⁸ This is not to suggest that Kay admits that he has ever used all of the names listed at paragraph three of the HDO. Kay has never done business under most of the names listed at paragraph three of the HDO and a sufficient investigation by the Commission would have disclosed that fact to the Commission and satisfied it as to that situation.

to have sufficient notice of the facts alleged against him to allow him to prepare an adequate defense.

At paragraph four of the HDO, the Commission stated that

We also have information that Kay may willfully cause interference to radio systems, including systems carrying public safety communications traffic, in order to coerce or mislead licensees into retaining him as their communications provider. Kay or his sales staff allegedly calls on the persons experiencing the interference and offers to provide them higher quality communications service.

Neither the statement presented at paragraph four of the HDO nor the issue designated at paragraph 10(e) of the HDO gave Kay notice of the facts alleged against him which is sufficient to prepare a defense. Paragraph four informs Kay only that some unknown named person has said that Kay "may"⁹ willfully cause interference to some unidentified person, at some unidentified place, at some unstated time, and that some unknown named person allegedly called on some unidentified person at some unstated time, offering to provide someone with communications service. At the least, Kay was entitled to notice as to the identity(ies) of his accuser, the identity(ies) of the station(s) with whose communications he allegedly may willfully interfere, the identity of the public safety entity(ies) with which he may have interfered, the identity(ies) of the station which Kay may have employed to willfully cause the alleged

⁹ The word "may" as used in the HDO is susceptible to multiple interpretations. It could be read as implying that the Commission has no knowledge, whatsoever, of the truth of the allegation which someone appears to have made against Kay. Improbably, it could be read as suggesting that Kay somehow has leave to willfully cause interference. It could be interpreted as suggesting that Kay continually engages in willfully causing interference. It could also be read as suggesting nothing more than that Kay might cause interference at some indefinite future time. Regardless of the way in which one may interpret the word "may", the HDO failed to give Kay notice of the facts of the allegation against him.

interference, and the dates, times, and places of all material events which constitute the allegation. Since it does not appear from the face of paragraph four that the Commission actually has anything more to present than an allegation by someone that Kay "may" have caused interference, and since the designated issue does not give Kay sufficient information on which to base a defense, Kay respectfully requests that the presiding officer delete the allegation presented at paragraph four and the issue designated at paragraph 10(e) of the HDO. Alternatively, Kay requests that the presiding officer change the HDO to provide him with notice of the facts alleged against him which is sufficient for him to prepare a defense.

At paragraph five of the HDO, the Commission stated that it had information which indicated that "Kay and his sales staff have misused the Commission's processes by, for example, fraudulently inducing licensees or others to sign blank Commission forms seeking modification of licenses or to sign forms the intent of which was misrepresented by Kay or his employees." At paragraph 10(f) of the HDO, the Commission designated an issue as to whether Kay "has abused the Commission's processes in order to obtain cancellation of other licenses." However, at paragraphs five and 10(f) the HDO failed to set forth any fact constituting an allegation that in any specific instance Kay had violated any statute or Commission rule or policy or committed any other wrongdoing within the Commission's jurisdiction. Because the HDO failed to set forth at paragraph five and paragraph 10(f) of the HDO any fact of any specific instance in which Kay ever committed any act which violated a statute, a Commission rule or policy, or took any other action which would call into question his qualifications to be a Commission licensee, the presiding officer should either delete paragraphs five and 10(f) of the

HDO or change the HDO to give Kay notice of the facts and law alleged against him which will be sufficient to allow him to prepare a defense.

Paragraph 10(g) of the HDO designated an issue "to determine, in light of the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr. is qualified to remain a Commission licensee". However, paragraph 10(g) did not specify the nature of the qualification of Kay which the Commission was placing in issue. Section 308(b) of the Act, 47 U.S.C. §308(a), provides that "all applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, or other qualifications of the applicant" Paragraph 10(g) of the HDO failed to specify the qualification or qualifications of Kay which the Commission has by regulation prescribed which it calls into question with respect to Kay. Because paragraph 10(g) did not place Kay in a position to prepare an adequate defense, the presiding officer should either delete the issue designated at paragraph 10(g) or change the HDO to inform Kay of the nature of the qualification which is/are to be placed in issue.

At paragraph 10(h) of the HDO, the Commission designated an issue "to determine if any of James A. Kay, Jr.'s licenses have automatically cancelled." However, paragraph 10(h) did not provide any fact constituting an allegation that any specific license had cancelled automatically sufficient to allow Kay to prepare a defense.¹⁰ Because paragraph 10(h) was not

¹⁰ Since automatic cancellation of a license would leave the Commission with nothing to adjudicate, there is a certain lack of reasonableness and logic to designating for hearing an issue as to whether a license had automatically cancelled, and, therefore, no longer exists.

sufficient to give Kay reasonable notice of the facts alleged against him, the presiding officer should either delete paragraph 10(h) from the HDO or should change the HDO to present allegations of fact concerning a specific station or stations sufficient to allow Kay to prepare an adequate defense.

Kay recognizes that the presiding officer may not be in possession of sufficient facts to change the HDO in the manner requested by Kay.¹¹ Accordingly, if the presiding officer does not delete issues for which deletion is requested and the presiding officer does not have facts sufficient to change the issues, then, in the alternative, Kay respectfully requests that the presiding officer order the Bureau to provide a bill of particulars setting forth the facts which are to be placed in issue and specifying the statute or Commission Rule which Kay is alleged to have violated with respect to each designated issue.

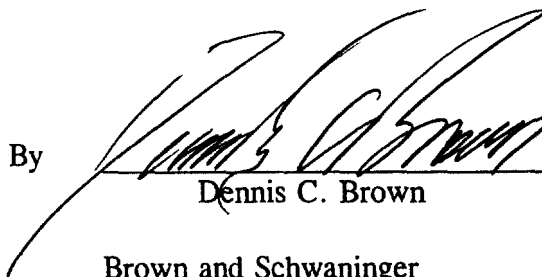
¹¹ It is because Kay recognized that the presiding officer would not be likely to have facts in his possession which are not set forth in the HDO that Kay had originally filed a motion similar to the instant Motion with the Commission. However, further legal research has demonstrated that the more correct course is to file such a motion with the presiding officer.

Conclusion

For all the foregoing reasons, Kay respectfully requests that the presiding officer delete, enlarge or change the issues and other elements of the HDO as described herein, or, in the alternative, order the Bureau to present a bill of particulars setting forth the facts which are to be placed in issue and specifying the statute or Commission Rule which Kay is alleged to have violated with respect to each designated issue.

Respectfully submitted,
JAMES A. KAY, JR.

By

A handwritten signature in black ink, appearing to read "Dennis C. Brown", is written over a horizontal line.

Dennis C. Brown

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Dated: January 25, 1995